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RESPONSE REQUESTED

ORIGINAL

No. 96-7171 (4)

Supreme Court, U.S.

FILED

MAR 12 1997

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October 1996

RANDY A. SPENCER,

Petitioner,

vs.

MICHAEL L. KEMNA and JEREMIAH W. (JAY) NIXON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS "HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER" BECAUSE A PETITION FOR HABEAS CORPUS CHALLENGING A PAROLE REVOCATION FILED ON APRIL 1, 1993 BECAME MOOT ON AUGUST 7, 1993, WHEN THE PETITIONER WAS RERELEASED ON PAROLE, WITHOUT A DECISION ON THE MERITS BEING ISSUED BY THE DISTRICT COURT, AND THE DISTRICT COURT LATER DENIED THE PETITION AS MOOT ON AUGUST 23, 1995.

II. WHETHER THE DECISION OF THE COURT OF APPEALS THAT A PAROLE REVOCATION CREATES NO COLLATERAL CONSEQUENCES REGARDING FUTURE PAROLE CONSIDERATION UNDER MISSOURI LAW SUFFICIENT TO JUSTIFY HABEAS REVIEWS, IS IN CONFLICT WITH THE DECISIONS OF THE SECOND, SEVENTH AND NINTH CIRCUIT COURTS OF APPEALS.

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STATEMENT OF THE CASE

Petitioner, Randy G. Spencer, was convicted of felony stealing and burglary by the Circuit Court of Jackson County, Missouri. On November 18, 1990, he was sentenced to concurrent terms of three years imprisonment for these offenses. Taking into account 28 days of jail time credit petitioner began serving these sentences on October 17, 1990.

Petitioner was paroled from his sentences on April 16, 1992. Petitioner's parole was revoked on September 24, 1992 following a revocation evidentiary hearing. The parole board made the following finding:

NOW, THEREFORE, after careful consideration of evidence presented, said charges which warrant revocation are sustained, to wit:

#1 - LAWS: I will obey all the federal and state laws, municipal and county ordinances. I will report all arrests to my Probation and Parole Officer within 48 hours.

#6 - DRUGS: I will not have in my possession or use any controlled substance except as prescribed for me by a licensed medical practitioner.

#7 - WEAPONS: I will, if my probation or parole is based on a misdemeanor involving firearms or explosives, or any felony charge, not own, possess, purchase, receive, sell or transport any firearms, ammunition or explosive device or any dangerous weapon as defined by federal, state or municipal laws or ordinances.

**Evidence relied upon for violation is from the Initial Violation Report dated 7-27-92.

The violation report relied on by the parole board indicated that petitioner raped a woman he had met at a crack house using a screwdriver as a weapon and that after his arrest he had admitted using crack on the day of the attack. The violation report indicated that petitioner admitted to the arresting officer that he had pushed the victim in order to get "dope" which she

had in her purse, causing her to fall on the bed and petitioner acknowledged that he may have hit the victim in the head.

The report recommended revocation of parole noting that petitioner had admitted to previously smoking crack cocaine while on parole and to "using anything I can get my hands on." The report also noted that the petitioner was a registered sex offender having previously been convicted of sodomy in 1983 and sentenced to five years in prison. The officer making the report indicated that he felt petitioner was a clear danger to the community.

On April 1, 1993, petitioner filed a federal habeas corpus petition raising four grounds for relief. These grounds are paraphrased below:

- 1) Petitioner was improperly denied a preliminary hearing concerning revocation of his parole;
- 2) Petitioner's conditional release date (the date on which he would normally be conditionally released on parole) was moved back without a hearing after his parole violation;
- 3) Petitioner's parole revocation hearing was flawed for various reasons;
- 4) Petitioner had to wait four months after the hearing to be notified why his parole was revoked even though he believes he should have been notified of the reasons for the denial within twenty days.

On May 3, 1993, the United States District Court ordered respondent to show cause why the writ of habeas corpus should not be granted by June 3, 1993. After receiving two extensions of time totaling five weeks respondent filed a timely response to the show cause order on July 7, 1993.

On August 7, 1993 petitioner was again paroled. On October 16, 1993, petitioner was discharged from parole upon completion of his sentences. On August 23, 1995, the United States District Court dismissed the habeas corpus petition as moot noting that petitioner had been

released on parole approximately four months after he had filed his petition and had completed service of his sentence approximately two months after that. Petitioner filed a notice of appeal on September 5, 1995. The District Court denied a certificate of probable cause on October 5, 1995. On November 16, 1995 the Eighth Circuit Court of Appeals granted a certificate of probable cause to appeal. Petitioner is currently serving an unrelated seven year sentence for attempted felony stealing.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW DID NOT SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OR SANCTION SUCH A DEPARTURE BY A LOWER COURT AS TO CALL FOR AN EXERCISE OF THE SUPERVISORY POWER OF THIS COURT.

The petitioner alleges that this Court should use its supervisory power to overturn the decision below because the United States District Court granted respondent two extensions totaling five weeks and itself took an excessively long period of time deciding petitioner's case, and as a result petitioner's case became moot or arguably moot. This argument must fail for several reasons. First, the time between filing of the habeas petition on April 1, 1993, and its becoming moot on August 7, 1993, was so short that it was impossible to litigate fully the petition in the District Court and on appeal before it became moot, without radically departing from the accepted and usual course of judicial proceedings. Second, the case was fully litigated within the accepted and usual course of judicial proceedings. Third, petitioner never put the Court below on notice, through a petition for mandamus, that he believed the District Court proceedings were excessively slow and therefore the court below knew of no alleged reason to act to accelerate the District Court proceedings.

(i) The habeas petition was filed on April 1, 1993 and petitioner was released on parole on August 7, 1993 approximately four months later. The petitioner's release on parole was the triggering event for the mootness or arguable mootness of a challenge to parole revocation. See *Watts v. Kentucky*, 757 F.2d 964, 965-966 (8th Cir. 1995) (noting that challenge to parole revocation became moot when the petitioner was paroled prior to oral argument on appeal).

A study by the Bureau of Justice Statistics of the United States Department of Justice indicates

that the mean processing time in federal district courts nationwide for habeas petitions containing more than three grounds is 359 days. United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review, Challenging State Court Criminal Convictions (Discussion Paper); September 1995, NCJ-155504 – hereinafter Justice Department Report – at 23.

The Internal Operating Procedures of the Eighth Circuit Court of Appeals provide a standard period of forty days following docketing for an appellant's brief to be filed, an additional thirty days for the appellee's brief, fourteen more days for a reply brief and sixty more days following oral argument for a decision. Eighth Circuit Court of Appeals Internal Operating Procedures Appendix A.

It was impractical to fully litigate petitioner's claim before it became moot within any time frame even resembling the accepted and usual course of judicial proceedings. The allegation that the actions of the District Court and respondent caused mootness is factually wrong. Mootness was inevitable.

(ii) The length of time involved in litigating petitioner's case was not objectively so far outside the accepted and usual course of judicial proceedings as to justify exercise of supervisory authority. Respondent received two extensions totaling five weeks due to the press of business. Review of statistics in the Justice Department Report referenced earlier reveals that Missouri inmates in the period for which data was provided – 1991 – filed thirty-seven federal habeas petitions per one thousand inmates for a total of 582 petitions, making these inmates the most prolific habeas filers per capita in the nation (Justice Department Report at 8). The national average was only fourteen petitions per one thousand inmates (*Id.*). Bearing in mind the litigious nature of Missouri inmates and the resulting demands on respondent and the District Courts

which must annually analyze hundreds of federal habeas petitions as well as conduct other business, some delay due to the press of business is understandable. Neither the District Court nor respondent acted unreasonably.¹

(iii) If petitioner believed the District Court allowed his case to be delayed excessively he could and should have filed a mandamus action in the Eighth Circuit Court of Appeals. In that way the petitioner could have given the Eighth Circuit Court of Appeals notice of his complaint. It is inconsistent for petitioner to argue that the court below sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings when an appellant did not inform the supervisory appellate court of the alleged departure. See Hirsh v. Burke, 40 F.3d 900, 905 (7th Cir. 1994) (criticizing an appellant for complaining on appeal about a 23 month delay by a district court in issuing an opinion when the petitioner had not filed a mandamus action); Stewart v. Peters, 878 F.Supp. 1139, 1141-1142 n.3 (N.D. Ill. 1995) (District Court criticizes a habeas respondent for not filing a mandamus action or otherwise impressing on District Court genuine concern about Court's failure to rule on a petition).

II. THE OPINION OF THE COURT BELOW DOES NOT CONFLICT WITH DECISIONS OF THE SECOND, SEVENTH, AND NINTH CIRCUIT COURTS OF APPEALS SINCE THE OPINION OF THE COURT BELOW IS BASED ON THE

¹Review of the record from the Court of Appeals below reveals that petitioner asked for and received a three week extension of time for the filing of his brief on appeal and a two week extension of time for the filing of the reply brief. The latter extension was requested by counsel for petitioner "due to a recent influx of cases into my office as well as a generally heavy caseload." Petitioner also asked for and received a two week extension for filing a rehearing motion. See Attachments A through D.

It seems inconsistent to argue that respondent may not be permitted five weeks of extensions in the District Court but that seven weeks of extensions are permissible for petitioner in the Court of Appeals.

EFFECT OF A PAROLE REVOCATION ON FUTURE PAROLE CONSIDERATION UNDER MISSOURI'S PAROLE STATUTE.

Petitioner alleges that the opinion of the court below conflicts with opinions from the Second, Seventh and Ninth Circuit Courts of Appeals. Petitioner cites the following cases as conflicting with the decision of the court below: *United States v. Parker*, 952 F.2d 31, 33 (2d Cir. 1991) and *Robbins v. Christianson*, 904 F.2d 492, 495-496 (9th Cir. 1990). Petitioner cites no specific Seventh Circuit case as evidence of the alleged conflict (See Petition Table of Cases).

Petitioner's finding of conflict is based on an unnecessarily broad reading of the opinion of the court below. The court below rejected petitioner's argument that the possibility that petitioner's parole revocation would adversely affect a future parole hearing was an adequate collateral consequence to support review under 28 U.S.C. §2254. *Spencer v. Kemna*, 91 F.3d 1114, 1116-1118 (8th Cir. 1996). In reaching its decision the court below noted that "Under Missouri statutes and regulations the Board does not explicitly rely on a parole violation even as one factor in its decision regarding whether to grant parole." Id. at 1117. The court below also noted that Missouri parole regulations explicitly state that a parole violator is eligible to be considered for release on parole. Id. at 1117 n.2.

The decision of the court below was supported by the specific wording of the Missouri parole statute and regulations. The decision can and should be read narrowly as affecting only Missouri cases, since the specific consequence petitioner alleged justified review in federal court -- possible prejudice to future parole consideration -- may be decided on issues of Missouri statutory and regulatory law.

United States v. Parker is not in conflict with the decision of the court below since the *Parker* court found that a probation violation is likely to effect future parole consideration in

New York based on an analysis of New York statutory law. *United States v. Parker*, 952 F.3d at 33. *Robbins v. Christianson* is also not in conflict with the decision of the court below since the *Robbins* court found that a petitioner could challenge prison discipline for drug use because of the collateral consequence of having his discipline for drug use potentially affect his future employment. *Robbins v. Christianson*, 904 F.2d at 496. *Parker* relies on analysis of New York statutory law and is distinguishable on that basis. The holding of the *Robbins* case is based on a collateral consequence -- the effect of a finding of drug use on future employment -- which was not raised or addressed by petitioner in the court below. *Robbins* is distinguishable for that reason.

The court below decided the narrow question presented to it -- i.e. whether petitioner's parole revocation so affected his chances of future parole as to create a collateral consequence sufficient to support federal habeas corpus review of an otherwise moot claim. This question is necessarily married to the specifics of the Missouri parole statute and regulations. There is no conflict with cases from other circuits which found either different collateral consequences justifying federal habeas corpus review or cases which relied on parole statutes of other states to find the potential affect on a future parole justified habeas review.

CONCLUSION

WHEREFORE, for the aforementioned reasons, respondent respectfully prays that petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

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Attorney General

michael j. spillane
MICHAEL J. SPILLANE
Assistant Attorney General
Counsel of Record

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Attorneys for Respondent

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3629WMKC

Randy G. Spencer,

Appellant,

vs.

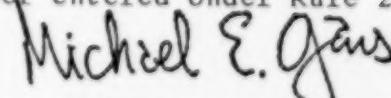
Mike Kemna; Missouri Attorney
General,

Appellees.

The motion of appellant for an extension of time until August 30, 1996 to file a petition for rehearing with suggestion for rehearing en banc is granted.

August 13, 1996

Order entered Under Rule 27B(a):



Clerk, U.S. Court of Appeals, Eighth Circuit

Randy Spencer v. Mike Kemna and Jeremiah
W. (Jay) Nixon
No. 96-7171
Attachment A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3629WMKC

Randy G. Spencer

Appellant,

vs.

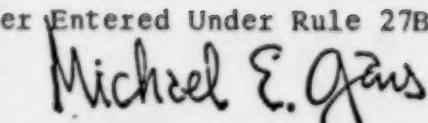
Mike Kemna, et al.

Appellees.

Appellant's motion for an extension of time to file the reply brief is granted. Appellant may have to 4/4/96 to file the brief.

March 20, 1996

Order Entered Under Rule 27B(a):



Clerk, U.S. Court of Appeals, Eighth Circuit

Randy Spencer v. Mike Kemna & Jeremiah
W. (Jay) Nixon
No. 96-7171
Attachment B

MONROE HOUSE LAW CENTER



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ATTOR.

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March 15, 1996

Jackie Polk
U.S. Court of Appeals
for the Eighth Circuit
Office of the Clerk
1114 Market St.
St. Louis, MO 63101

Re: Randy G. Spencer v. Mike Kemna, et al.
Case No. 95-3629

Dear Jackie:

As per our telephone conversation of Friday, March 15, 1996, please consider this a formal request for a 14-day continuance to file my Reply Brief in the above-referenced matter. It is my understanding that the Reply Brief is currently due on Thursday, March 21, 1996. As such, I am requesting that the due date be changed to Thursday, April 4, 1996.

The need for this delay is due to a recent influx of cases into my office, as well as a generally heavy case load. I am fearful that an attempt to complete the Reply Brief for Mr. Spencer by March 21, 1996 could have an effect on the final product. Please note that I will attempt to get the Brief filed with you prior to April 4, 1996, if at all possible.

This request for delay is in no way an attempt to hinder or delay the proceedings of this Court.

John W. English
Nicholas M. Monaco
Keith A. Wenzel
*Ann Monaco Warren
Mark G.R. Warren
Brian K. Francka
David G. Bandre

of Counsel:
Andrew Jackson Higgins
Former Judge:
Sixth Judicial Circuit (1960-1964)
Missouri Supreme Court (1979-1991)
Charles P. Dribben (1929-1991)

Thank you for your attention to this matter. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

David G. Bandre'

DGB:aec

cc: Michael J. Spillane,
Asst. Attorney General
Randy G. Spencer

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3629WMKC

Randy Spencer

Appellant,

vs.

Mike Kemna, et al.

Appellee.

Appeal from the United States
District Court for the
Western District of Missouri

Appellant's motion for an extension of time to file the brief is granted. Appellant may have until 2/9/96 to file the brief.

January 11, 1996

No. 96-7171

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

RANDY G. SPENCER,

Petitioner,

RECEIVED

MAR 17 1997

vs.

MICHAEL L. KEMNA and JEREMIAH W. (JAY) NIXON,

Respondents.

OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of this Court, and that on this twelfth day of March, 1997, I deposited in the mails, first-class postage prepaid, a true and correct copy of the within brief in opposition to:

INGLISH & MONACO, P.C.

John William Simon

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Respectfully submitted,

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Assistant Attorney General

Counsel of Record

Order Entered Under Rule 27B(a):

Michael E. O'Boyle

Clerk, U.S. Court of Appeals, Eighth Circuit

Randy Spencer v. Mike Kemna & Jeremiah
W. (Jay) Nixon
No. 96-7171
Attachment D